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IN THE

Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This Brief *amicus curiae*[1] is submitted in support of Petitioner with the written consent of both Petitioner and Respondents, copies of which are annexed hereto.

The first issue addressed by Petitioner involves the application of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"), and is accordingly a matter in which Canada has a substantial sovereign interest. Thus Canada submits this Brief setting forth the international law basis for concluding that, when Powerex Corporation is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign

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1 No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

status under the FSIA.[2] Because Canada believes its views on a matter of significant concern to the Government of Canada and its citizens would materially assist the Court in its consideration of this appeal, Canada respectfully submits this Brief.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

The Government of Canada, as sovereign, has a vital interest in the issue addressed in this Brief *amicus curiae*: whether, when Powerex Corporation ("Powerex") is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the FSIA. Although Powerex concedes it is not immune from suit, the FSIA "guarantee[s] a foreign state defending an unbarred claim certain protections," including the right to have claims against it tried to a United States District Judge, without a jury. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 1603(b)(2).

In deciding to exercise their own powers through political subdivisions or controlled corporations, Canada or its political subdivisions consider whether immunity and other sovereign prerogatives are available, under principles of international law, to the entity through which they choose to act. Under recognized principles of international law,

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[2] Because the second question on which the Court requested briefing appears to be one relating to the jurisdiction of the United States federal appellate courts, and is therefore purely a matter of United States law, Canada believes the parties and the United States are in the best position to address it.

Powerex is entitled to be treated as a sovereign, and to be accorded the benefits of such status under the FSIA, when it is acting on behalf of either British Columbia Hydro and Power Authority ("BC Hydro") or the Government of British Columbia.

Canada has an interest in having in place clear rules that respect fundamental principles of international law and that protect agents of Canada or of its political subdivisions against the risk of scrutiny by state court juries. This interest is embodied in the FSIA, with its recognition of "the potential sensitivity of actions against foreign states." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983). For the reasons discussed below, the Ninth Circuit's approach to interpreting the FSIA is not compatible with that interest, or, more broadly, with fundamental principles of international law. The Ninth Circuit's divergence from the analytical framework followed by other circuit courts of appeals -- which fits the international law framework -- also creates substantial uncertainty as to the rules that will be applied to Canada and its political subdivisions. Canada believes this Court should resolve this difference in approach in favor of the other circuits' analyses.

Canada has an especially strong interest in the practical consequences of this Court's decision because, given the interdependence of the economies of Canada and the United States -- which enjoy the largest bilateral trading relationship in the world -- the denial of sovereign status to agents of Canada or its political subdivisions is likely to have significant effects on the conduct of business across the Canadian-United States border.

Canada supports Petitioner's request that this Court reverse the decision below because of its strong interest in ensuring that the entities through which it and its political

subdivisions act are properly accorded sovereign status, including the benefits due sovereigns under recognized principles of international law, which should apply in interpreting the FSIA.

SUMMARY OF ARGUMENT

The Ninth Circuit found -- and Canada agrees -- that British Columbia is itself a "political subdivision" or "constituent unit" of Canada, thereby coming under the definition of "state" or "sovereign" provided by the FSIA. *California* v. *NRG Energy, Inc.*, 391 F.3d 1011, 1024-25 (9th Cir. 2004). Powerex is wholly owned by BC Hydro, which is itself treated as a foreign sovereign. The Ninth Circuit concedes BC Hydro to have been, in all respects relevant to this lawsuit and at all relevant times, performing "sovereign functions." *Id.* at 1025. Under recognized principles of international law, Powerex is equally entitled to be treated as a sovereign when it is acting on behalf of BC Hydro or of the Government of British Columbia. Those principles also require that great weight be given to the views of British Columbia regarding Powerex's sovereign status.

Determination of sovereign status is governed by rules of customary international law regarding the sovereign equality of States and non-interference by one State in the internal affairs of another. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 287-88 (6th ed. 2003); *Oppenheim's International Law*, 81-82 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). Both of these tenets are fundamental to the international legal system. Thus, courts charged with determining the content of the applicable rules must look to the practice of States on questions of immunity and sovereign status. These are found both in national law -- legislation and decisions of national

courts -- and in the principles codified in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. G.A., 59th Sess., U.N. Doc. A/RES/59/38 (Dec. 16, 2004).

Principles of comity recognized by both Canadian and United States courts require courts to interpret their national legislation in a manner consistent with international law and the practice of States in all cases in which it is possible to harmonize the two, as it is here. Complying with international law principles serves the interests of predictability, enabling a sovereign to determine the best way to structure its activities and to exercise its powers. Honoring comity ensures that the views of the sovereign that creates an entity -- as British Columbia did with respect to BC Hydro and Powerex -- are accorded special weight in deciding whether an entity like Powerex is an organ, agency, or instrumentality of British Columbia.

Rules of international comity promote the cooperation and accommodation essential to the orderly and harmonious regulation of international commerce. Adherence to these principles is essential to the functioning of the closely related economies of Canada and the United States. Disregard of these fundamental principles, where the responsible government itself has chosen to act through particular State entities, will only complicate and impede commercial relations between the two countries. Disregard of international law also intrudes upon, and derogates, the sovereign prerogatives, rights, and interests of the Government of Canada and its Provinces and other political subdivisions to decide the manner in which Governmental activities will be conducted.

ARGUMENT

I.

UNITED STATES COURTS SHOULD INTERPRET THE FSIA IN A MANNER CONSISTENT WITH PRINCIPLES OF COMITY AS APPLIED IN CUSTOMARY INTERNATIONAL LAW AND THE PRACTICE OF STATES.

Principles of international law and comity properly apply when United States courts consider how they should interpret the term "sovereign" under the FSIA. The importance of comity is heightened in this particular case, where the political subdivision that created Powerex, and determined what functions it should perform, has a view very different from that of the Ninth Circuit as to whether Powerex is entitled to the procedural protections accorded to sovereigns. This Court should not affirm the ruling below, which disregards the views of the sovereign that creates an entity and the standards for determining sovereign status applied by the State under whose laws the entity was formed. A decision by this Court affirming the Ninth Circuit would adversely affect the ability of foreign sovereigns, such as Canada and its political subdivisions, to determine with certainty how their structuring of the entities through which they conduct their affairs will in fact effect their sovereign goals. Acceding to principles of comity of nations would, in contrast, lead to an interpretation of the FSIA that is consistent with that of other States and international law.

This Court, like Canadian courts, has long held that international law considerations form an essential element of statutory construction. Over two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of statutory construction, namely, that "an act of

Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

This Court has repeatedly reaffirmed the vitality of Chief Justice Marshall's rule, firmly establishing principles of comity as part of the jurisprudence of the United States. Thus, the opinion in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), followed the rule that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 236.

The Courts of Appeals have similarly recognized the fundamental role of comity in United States jurisprudence. In *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987), the commentary to which confirms the "rule of construction" that statutes must be interpreted whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

Principles of comity are also firmly established in Canadian jurisprudence. Indeed, as the Supreme Court of Canada has observed, "[t]he notion of comity has retained its vitality in the jurisprudence of Canadian courts." *Spar Aerospace Ltd.* v. *Am. Mobile Satellite Corp.*, 4 S.C.R. 205, 219 (Can. 2002).

The Supreme Court of Canada has repeatedly defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Invs. Ltd.*, 3 S.C.R. 1077, 1096 (Can.

1990), the Supreme Court recognized that "'comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (citing *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895)). *See also Pro Swing Inc.* v. *ELTA Golf Inc.*, 2006 A.C.W.S.J. 157, at *26 (Can. 2006) (invoking the definition of comity developed by the United States Supreme Court in *Hilton* v. *Guyot*, 159 U.S. at 163-64); *Spar Aerospace*, 4 S.C.R. at 219 (same).

In this case, no reason appears for either the Ninth Circuit or this Court, in interpreting the FSIA, to decline to follow principles of comity long established in United States, Canadian and international law. Following these principles in this case counsels that United States courts should give considerable weight to the views of the Government of British Columbia -- the entity that created Powerex -- as to whether Powerex is entitled to be accorded the procedural safeguards due a sovereign under the FSIA. 28 U.S.C. § 1603.

II.

THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF INTERNATIONAL LAW UNDER WHICH ENTITIES EXERCISING SOVEREIGN FUNCTIONS SHOULD BE TREATED AS SOVEREIGNS.

The United Nations Convention on the Jurisdictional Immunities of States and Their Property codifies the customary international law of State immunity. Article 2(1)(b)(iii) of that Convention includes in the definition of a "State" "agencies or instrumentalities of the State or other entities, *to the extent that they are entitled to perform and are actually performing* acts in the exercise of sovereign authority of the State." G.A. Res. 59/38, *supra* (emphasis added). The Convention thus confirms the importance under international law of an entity's *function* in analyzing whether it qualifies for sovereign treatment.

Although the Ninth Circuit correctly held that the Province of British Columbia, a political subdivision of Canada, is entitled to sovereign treatment under the FSIA, *see NRG Energy, Inc.*, 391 F. 3d at 1024-25, it did not consider the "function" test applied by courts around the world to determine whether agents and sub-agents of political subdivisions should also be accorded sovereign status. *Cf.* State Immunity Act, R.S.C., ch. S-18, § 2 (1985) (Can.) (defining "foreign state" to include, *inter alia*, "any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state"). Yet, under international law, the function test should be considered in deciding whether an "agent" or an "organ" is

to be treated as a sovereign. *See, e.g.*, Brownlie, *supra* at 336-37.

In many countries, including Canada, separate juridical status creates a presumption against immunity. However, that presumption is overcome when the entity is exercising sovereign functions. This approach can be found in the legislation of the United Kingdom, South Africa, and others. *See* State Immunity Ordinance, No. VI of 1981, § 15(2) (Pakistan); State Immunity Act, Cap 313, § 16(2), *available in* Materials on Jurisdictional Immunities of States and Their Property (United Nations Legislative Series), U.N. Doc. ST/LEG/SER.B/20 32 (1982) (Singapore); Foreign States Immunities Act 87 of 1981, § 15(1) (South Africa); State Immunity Act, 1978, § 14(2) (U.K.), *reprinted in* 17 I.L.M. 1123 (1978). In countries such as Australia, legislation provides as well that agencies and instrumentalities of foreign States are immune in relation to acts of sovereign authority if the immunity had been available to the State itself in the circumstances. Foreign States Immunities Act, 1985, No. 196 of 1985, *amended by* Statute Law (Miscellaneous Provisions) Act, 1987, No. 141 of 1987.

The United States, in its brief *amicus curiae* supporting the petition for a writ of certiorari, similarly advocates an analysis that focuses on an entity's *function* on behalf of a sovereign -- such as Powerex's "important role in discharging Canada's treaty obligations." *See* Brief for the United States as *Amicus Curiae* at 12. Canada is in agreement with the position taken by the United States in that Brief *Amicus Curiae*. The function test enjoys widespread acceptance by States, including the United States, and forms a relevant ground of decision that was ignored by the Ninth Circuit.

Under the function test, as under the principles of comity of nations addressed above, the views of the Province of British Columbia are of special relevance. Given British Columbia's position that Powerex was created to fulfill a sovereign function, and that it was doing so at all times relevant to this action, this Court should, consistent with international law and practice, accord to Powerex the procedural benefits it seeks under the FSIA.

CONCLUSION

This Court should follow principles of international law and the practice of States regarding comity of nations, including the importance of the "function test," to determine whether Powerex is to be treated as a sovereign. Under these principles, it was unreasonable for the Ninth Circuit to construe the FSIA to exclude from the definition of "sovereign" a corporation wholly owned by an agent of British Columbia, which British Columbia formed for the purpose of, and considers to have been, carrying out a sovereign function. Canada urges this Court to reverse the judgment of the Ninth Circuit, whose holding improperly disregarded the "function" test applied by courts around the world and advocated by the United States in this case, and further, ignored the views of the Province of British Columbia in determining whether Powerex should be accorded sovereign status.

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